

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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UNITED STATES, et al., : Civil Action No.:  
 : 1:23-cv-108  
Plaintiff, :  
versus : Friday, October 27, 2023  
 : Alexandria, Virginia  
GOOGLE LLC, :  
 : Pages 1-15  
Defendant. :  
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The above-entitled motions hearing was heard before  
the Honorable John F. Anderson, United States Magistrate  
Judge. This proceeding commenced at 11:12 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

THE DEPUTY CLERK: Calling Civil Action Matter  
Number 23-cv-108, United States, et al. versus Google LLC.

MR. MENE: Good morning, Your Honor. Gerard Mene  
with the U.S. Attorney's Office.

MS. WOOD: Good morning, Your Honor. Julia Wood  
from the DOJ. With me, my colleague, Michael Freeman, who  
will be arguing today.

THE COURT: Good morning.

MR. FREEMAN: Good morning, Your Honor.

MR. HARRISON: Good morning, Your Honor.  
Jonathan Harrison from the Virginia Attorney General's  
Office on behalf of the plaintiff states.

THE COURT: Thank you.

MR. REILLY: Good morning, Your Honor.  
Craig Reilly on behalf of defendant, Google, together with  
my co-counsel, Jeannie Rhee and Heather Milligan from the  
Paul, Weiss firm. And with the Court's permission, Ms. Rhee  
will address the Court this morning.

THE COURT: Okay. Well, surprisingly, the briefs  
were small in this matter, so I've had plenty of time to  
review them fully and completely.

I'll hear from plaintiffs. I've just got to say,  
I -- when I made my comments about coming back to the Court,  
it was not we just want these; it's, you have to show me

1 something as to why they're really needed. And just  
2 providing me with lists of, you know, the numbers of  
3 documents, and that there are a lot of documents that this  
4 person is a custodian to, you know, really doesn't -- I'm  
5 not finding that persuasive. And I suspect every document  
6 that got produced in this case could prompt one to want to  
7 ask somebody a question on it. Okay. So the idea that we  
8 got a lot of documents, and this person is a custodian, and  
9 we would like to ask them questions about it really isn't  
10 good cause, at least in my view, of opening up discovery and  
11 allowing two more depositions.

12 So, tell me, why isn't there more meat on the  
13 bones here as to these two individuals and what it is that  
14 these new documents -- and you've deposed one already in the  
15 investigation --

16 MR. FREEMAN: Yes. Certainly, Your Honor.

17 THE COURT: Go ahead.

18 MR. FREEMAN: I think I can place some meat on the  
19 bones of what we have found to date, but also why it's not  
20 laid out in detail in the papers.

21 The first is, it's an ongoing process of discovery  
22 review. What we have marked as highly relevant of these two  
23 custodians in the late productions, we have endeavored to  
24 then go back and check if they had been produced before in  
25 duplicates or near duplicates, meaning that the relevant

1 language had not been disclosed previously, or that  
2 95 percent of the words are not not similar. So it's an  
3 automated process to determine that they're new.

4 But to answer your question about whether they  
5 are -- about what's new about these particular things and  
6 why they're not in the appropriate filings is, why should  
7 Google, the defendant, have the advantage of seeing the  
8 deposition strategy of the plaintiffs beforehand? Because I  
9 think it's important to know why we're here today, is that  
10 we are here today because Google violated the discovery  
11 order, and, quite frankly, gave more documents now than  
12 before.

13 But to answer you question, Your Honor, we are  
14 prepared today to, as we noted in our papers, to provide the  
15 highly-relevant documents to the Court for review to show  
16 and explain to you the relevance in what we didn't know and  
17 what we want to ask them moving forward.

18 Also, we are prepared to forgo affirmative use of  
19 two prior depositions that we took in this case to still  
20 limit the number to the ten depositions, and we think that  
21 will limit the prejudice to the plaintiffs by also not  
22 giving us any sort of benefit of the 12 documents.

23 And the reason why these two particular people are  
24 important, Your Honor, they were under serious consideration  
25 prior to discovering the discovery violation. In

1 particular, Mr. Sinaniyev is a current vice president of  
2 engineering, and, therefore, can fill the gap from the close  
3 of the investigation until present day. And then  
4 Mr. Bellack had always been on the plaintiffs' radar as a  
5 potential deponent. He was deposed in the investigation  
6 phase, and, therefore when we were deciding --

7 THE COURT: When was he deposed in the  
8 investigation phase?

9 MR. FREEMAN: I don't have the precise date for  
10 Your Honor. I could certainly get that to you. But in the  
11 year 2020.

12 What's important then is, while we looked at the  
13 new documents, we were severely handicapped and thought  
14 there were not that many new documents to ask him questions  
15 about. But that was before we knew that Google was sitting  
16 on a trove of 83,000 new Bellack documents. And because of  
17 that late disclosure, that would have ultimately tipped the  
18 scales in favor of deposing Mr. Bellack, had we known then  
19 what we know now.

20 And, therefore, we don't think we should be  
21 prejudiced further due to the discovery violation for an  
22 occurrence that we had no part in and actually took an  
23 affirmative step to try to avoid. That Google should not be  
24 rewarded by handicapping the plaintiffs of who we can depose  
25 by their significant late disclosures.

1 THE COURT: I'm a little concerned about the  
2 government's position of, we can't tell you what's relevant  
3 because we don't want to tip the other side off about what  
4 we think is relevant.

5 MR. FREEMAN: Just to be clear --

6 THE COURT: I mean, that's, in essence -- what  
7 you're saying is you can't present evidence to me to support  
8 your motion to show good cause, because if you told me any  
9 of the specifics, they would know what you're going to want  
10 to ask, you know, these two people.

11 MR. FREEMAN: I think there's two things, Your  
12 Honor. We are prepared to show the Court, as we indicated  
13 in an ex parte proceeding, but to what end would that have?

14 We would present a document to you to show the  
15 evidence. Inevitably, Google would challenge that or say it  
16 was related to some previously produced document, and the  
17 Court would not be further enlightened as to whether -- how  
18 relevant this particular document is.

19 The substance of these documents are dense and  
20 unique to this particular field, and, therefore, someone  
21 coming in from the outside looking in, it would be very  
22 difficult to determine the relevancy of that particular  
23 document. And I think it's clear that one document or one  
24 email or one particular offhanded comment could actually  
25 tilt the favor of deposing that particular person.

1 THE COURT: Well, there are probably dozens of  
2 people that you could make an identical argument about;  
3 right?

4 MR. FREEMAN: I'm not sure the number is that  
5 high, but I understand your point, Your Honor.

6 THE COURT: I mean, I'm -- the idea was that if  
7 you were going to come in and ask for more depositions than  
8 we had agreed and set and modified and all these things,  
9 you're going to have to show me good cause for it. And just  
10 coming in and saying, you know, we got a lot of documents,  
11 we got a lot more documents, I don't have any declarations  
12 indicating that, you know, a decision maker would have made  
13 this decision otherwise. I mean, I'm a little at a loss as  
14 to how you think the Court can find good cause based on, you  
15 know, the number of documents and that, you know, they have  
16 relevant information and you would like to ask somebody  
17 about those documents.

18 MR. FREEMAN: Well, I think the percentage, even  
19 of all documents in this particular case, including the  
20 investigation, more than half were disclosed after September  
21 the 8th.

22 THE COURT: Are they substantive? Do they have  
23 information in them? You're just giving me numbers, and  
24 you've said, you know, they've got relevant information that  
25 you would like to ask somebody about.



1 MR. FREEMAN: We're happy to provide a declaration  
2 if that would enlighten the Court.

3 THE COURT: Well, it's your motion. I mean, I  
4 don't tell you how to file a motion. I don't tell you --  
5 you know, you brought this to the Court's attention. You  
6 knew that you were going to have to establish good cause to  
7 do it. And I have to decide the motion based on the records  
8 that's in front of me, and there's nothing here.

9 MR. FREEMAN: I understand, Your Honor. I think  
10 it's important, though, that -- to level the playing field.  
11 That Google had the opportunity to make their decisions of  
12 who to depose on timely and complete production, and we  
13 don't believe that it's appropriate and that we are severely  
14 prejudiced by the idea that 2 million documents were  
15 disclosed after September 8th, but not just that,  
16 particularly to these two defendants. And as we had  
17 indicated before, there are substantive information within  
18 the late disclosed documents that are new and never seen  
19 before, and we are prepared to show the Court and establish  
20 the relevancy, but we don't think this should be a windfall  
21 for Google in terms of getting documents prior to a  
22 deposition that they wouldn't ordinarily have.

23 As we indicated in the papers, in the ordinary  
24 course, we would not have to produce anything to Google to  
25 establish who we want to depose and why we want to depose

1     them. The only reason why we're in here is because of the  
2     discovery violation, and, therefore, they shouldn't get an  
3     extra benefit or reward for their own discovery violation.  
4     We think that, therefore, it's fair and equitable to say  
5     that these two particular deponents we would have deposed if  
6     they did timely production, which they did not, and,  
7     therefore, we are just -- not a reward or windfall for the  
8     plaintiffs, but actually just putting us back on equal  
9     footing as if the discovery violation had not occurred.

10           THE COURT: All right. Let me hear from opposing  
11     counsel.

12           MR. FREEMAN: Thank you, Your Honor.

13           THE COURT: I take it when you say you want to not  
14     use -- I'm sorry. I've got one -- two other depositions.  
15     You want to permanently use two other depositions. Which  
16     two of those that you're saying you wouldn't use?

17           MR. FREEMAN: That would be Mr. Timothy Craycroft  
18     and Mr. Rahul Srinivasan, which was mentioned in Google's  
19     response.

20           THE COURT: All right.

21           MS. RHEE: Your Honor, when the Court said back on  
22     September 15th that plaintiffs' request for four additional  
23     depositions for the four that have already been taken was  
24     going to be denied and that there wasn't going to be a carte  
25     blanche do-over, there needed to be good cause shown for any

1 additional deposition request, that was the standard that  
2 needed to be met. This pleading and this motion doesn't  
3 meet that standard.

4           The measures that DOJ is now positing, that the  
5 two depositions that have already been taken, that they have  
6 decided now, after the fact, because those depositions they  
7 have before them, and perhaps DOJ doesn't like what they  
8 got, and so, therefore, they're going to not reopen them and  
9 they're happy to walk away from them is beside the point.  
10 At the time that they took them, they made the determination  
11 that those individuals were relevant, that they were  
12 important, and they took those.

13           More importantly, Your Honor, particularly with  
14 respect to Mr. Craycroft, not only was he a Google witness,  
15 but before he joined Google, he had been a senior Amazon  
16 executive for 15 years prior. And for the 170 pages of the  
17 deposition that DOJ took, there were no less than 188  
18 references to Amazon, and of the five documents that Google  
19 introduced in that deposition, four of those five were  
20 Amazon custodial documents, because Mr. Craycroft had been a  
21 designated custodian for Amazon during that time.

22           And so what Google chose to -- or what DOJ chose  
23 to do with respect to what they had available was to use  
24 some of their time in order to ask Mr. Craycroft about his  
25 prior time at Amazon. And that was entirely their

1 prerogative, and that was entirely their determination. And  
2 so that is something that has nothing to do with the  
3 post-production documents, that has nothing to do with now  
4 what they're seeking here in terms of the do-over or the  
5 potential swap. Just taking their motion on its face, the  
6 Court is right to just say that a recitation of the volume  
7 of documents is insufficient.

8           What we set out in our opposition is that DOJ was  
9 well aware of Mr. Bellack. DOJ had over 90,000 preexisting  
10 documents, and then an additional -- and here we have a  
11 dispute with respect to count. They say they only had 6,000  
12 litigation production documents; we actually, by our count,  
13 see that there were almost 15,000 additional documents. But  
14 none of that is actually relevant, because, again, as the  
15 Court rightly notes, it's not about the numbers; it's all  
16 about what's relevant in them. And the standard should be  
17 what is so new and material.

18           And what DOJ just told you today is, they're not  
19 sure, because they are still running the analysis. They  
20 don't know in the new post-produced documents what is new  
21 and what is material because they are still trying to see  
22 what the dupe looks like, and so they're not willing to  
23 proffer, and they're not in a position to proffer what is it  
24 about the post-ingestion site production that they didn't  
25 know previously when the complaint, the press, Mr. Bellack's

1 preexisting documents well known to DOJ certainly at the  
2 time of their investigation, at the time that they deposed  
3 them, at the time that they drafted the complaint, they were  
4 well, well aware.

5 And with that, Your Honor, unless there are  
6 further questions, I think the record and the pleadings  
7 speak for themselves.

8 THE COURT: Is there anything else from the  
9 government?

10 MR. FREEMAN: The plaintiffs were severely  
11 prejudiced by this late disclosure, and there are certain  
12 things that cannot be undone. One of the few things that  
13 the Court can do to limit that prejudice is to grant these  
14 two particular motions.

15 And I believe it's unfair to suggest that we have  
16 to go through all of the documents, including productions as  
17 late as last night, to make that analysis before the Court.  
18 And that there were key admissions, as we know, in those  
19 documents already that ultimately would have tipped our  
20 scale, and we think to eliminate the prejudice as much as  
21 possible, we believe that the request for relief is  
22 appropriate.

23 THE COURT: Well, you know, I think I have, in  
24 earlier hearings, expressed my concern about the document  
25 production by the defendant in this case. I addressed it

1 initially, and, you know, I told the parties that I was open  
2 to considering allowing additional depositions if the record  
3 established good cause for doing that.

4           You know, we all knew there were going to be a lot  
5 of new documents being produced at that time, and my  
6 intention, maybe not expressed as well as it probably should  
7 have been, was that if you were going to seek to take  
8 additional depositions, that you would have to show me who  
9 and why. And I know the who, but I'm not -- I don't think  
10 the record is sufficient for me to establish the why in this  
11 case.

12           You know, I am positive that there were a lot of  
13 new documents that had never been seen before that were  
14 produced in the millions of documents that have been  
15 produced, and I suspect that they are all relevant and that  
16 a number of them have certain people as custodians. But,  
17 you know, there has to be more than just that to get to the  
18 point of where I would allow you to reopen discovery and  
19 take additional depositions as to, you know, what their job  
20 duties are, what their responsibilities are, what the new  
21 information is related to that makes it significant enough  
22 for me to do this. And the idea that the government somehow  
23 wants to hide that information from the defendant is  
24 concerning.

25           I mean, you know, the issues in this case ought to

1 be pretty well known by now, and the idea that, you know,  
2 this -- you've got a lot of new documents about this issue  
3 from this person in order to establish opening up a  
4 discovery -- and, you know, you may argue about it, I may  
5 not understand it, but I can at least decide it based on a  
6 record as to, you know, whether it really has some substance  
7 to it.

8 So based on the record that's in front of me, I  
9 feel compelled to deny the motion to require these two  
10 additional depositions. Okay.

11 Thank you. Court will be adjointed.

12 (Proceedings adjourned at 11:32 a.m.)

13 -----  
14 I certify that the foregoing is a true and accurate  
15 transcription of my stenographic notes.

16 Stephanie Austin

17 Stephanie M. Austin, RPR, CRR  
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